

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

EDUARDO BENAVIDES,

Plaintiff,

v.

BUREAU OF PRISONS,

Defendant.

Civil Action No. 09-2026 (JEB)

MEMORANDUM OPINION AND ORDER

Plaintiff Eduardo Benavides, a federal prisoner, has narrowed his request under the Freedom of Information Act, to two June 2009 telephone calls the Bureau of Prisons recorded between Plaintiff and his then-attorney, Robert Switzer. As BOP now concedes that the content of the calls is not protected by any privacy interest and as Plaintiff is satisfied with a certified transcript of the conversations, the Court will order that BOP produce such transcript. Alternatively, it may produce recordings of the calls themselves.

I. Background

The background of this case and the proper legal standard for resolving FOIA disputes via summary judgment are both set forth in the Memorandum Opinion of March 30, 2011, authored by Judge Richard Roberts, to whom this case was previously assigned. The Court will rehash neither in addressing the parties' renewed Motions for Summary Judgment. For our purposes, it is sufficient to note that the sole remaining dispute centers around two telephone calls – one on June 5 and one on June 23, 2009 – placed by Plaintiff from federal prison to his former attorney. The recorded conversations total a little over eleven minutes. Upon the

Court's request, BOP has provided electronic copies of the conversations to the Court for *in camera* review, and the Court has now listened to both calls.

The parties have engaged in several rounds of briefing on a number of interesting issues – for example, whether such recordings constitute law-enforcement records under FOIA, whether an attorney has a privacy interest in his side of a conversation with his client, and whether an attorney has a privacy interest in matters beyond what he actually said, such as in his voice and its inflection. Given that the parties, in recent communications, have largely reached an agreement on what release is appropriate here, the Court need not resolve all these questions, but can, instead, narrowly determine the proper course here.

II. Analysis

In arguing against the release of the two calls, BOP relies on FOIA Exemption 7(C). “Exemption 7(C) authorizes the government to withhold ‘records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” Boyd v. Criminal Div. of U.S. Dept. of Justice, 475 F.3d 381, 386 (D.C. Cir. 2007) (quoting 5 U.S.C. § 552(b)(7)(C)). Even if the two calls constitute law-enforcement records – a position Plaintiff disputes – BOP may only withhold them if their release would constitute an invasion of privacy. BOP agreed in both its Reply and in the telephone conference call with the Court on Jan. 27, 2012, that Plaintiff's former counsel has no privacy interest in the content of the conversations. See Def. Reply at 9 (BOP would have released transcript of calls if Plaintiff had requested and paid for it). What is protected instead, BOP contends, is the attorney's “voice inflections and other non-lexical information.” Id. at 8.

While this may indeed be true for families' rights regarding audiotapes of their relatives' last moments before death, see New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (discussing cockpit recordings before explosion of Challenger spacecraft), such an argument appears strained in this context. BOP nonetheless argues, "One can easily imagine one of several reasons that Mr. Benavides's lawyer might have a privacy interest in the audio. Perhaps he became frustrated and raised his voice at his client. Perhaps he did not respond to questions. Or perhaps he fears that he may come across as sarcastic in the audio recordings." See Def. Resp. at 8. Having now listened to the recorded calls, the Court can say that none of these hypotheticals actually exists. The conversations, furthermore, contain no discussion of anything personal to the attorney, but instead only concern Plaintiff's case and counsel's representation.

In an attempt to find common ground, nonetheless, the Court in a conference call with the parties inquired of Plaintiff (through current counsel) whether he would be satisfied with the transcripts of the calls, which BOP did not oppose releasing. Plaintiff has now indicated that transcripts would suffice provided that they were accurate and authenticated by BOP and the Court. See Pl. Resp. (ECF No. 37). Given that both sides now agree on the propriety and sufficiency of releasing the transcripts, the Court will require their production.

BOP may follow its normal procedures in passing along any reasonable cost of transcription to Plaintiff. In the event BOP deems it easier to simply produce the recordings, that would obviously suffice as well. The Court will leave it to professional counsel to work out the details regarding timing and authentication, although the brevity of the calls suggests that production should be quickly accomplished. Once Plaintiff has received the transcripts or recordings, he may then dismiss the matter.

III. Conclusion

The Court, therefore, ORDERS that:

1. Defendant's Motion for Summary Judgment is DENIED; and
2. Plaintiff's Motion for Summary Judgment is GRANTED IN PART as set forth above.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: Feb. 9, 2012